

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

03 DEC 29 PM 4:40

U.S. DISTRICT COURT  
N.D. OF ALABAMA

UNITED STATES OF AMERICA, )  
 )  
vs. )  
 )  
RICHARD M. SCRUSHY, )  
 )  
Defendant. )

Case No. CR-03-BE-530-S

YB

**ENTERED**

**DEC 29 2003**

ORDER MODIFYING CONDITIONS OF RELEASE

This matter came before the court for hearing on the defendant's motion to modify the conditions of his release, filed December 16, 2003 (Doc. 63), to which the Government responded on December 18, 2003. After hearing the arguments, representations, and proffers of counsel, the court concludes that certain terms of defendant's conditions of release are due to be modified. Consequently, the motion to modify is GRANTED IN PART and DENIED IN PART, as set out more specifically below.

The decision for the court on this motion, as is the case with all issues dealing with the setting of conditions of release, involves a delicate and often uncertain balance between the rights of a presumptively innocent defendant and the interest of the Government and society in reasonably assuring that the defendant will appear for trial. That balance seldom lies at either extreme of the spectrum running from release on personal recognizance at one end to outright detention at the other. It would be easy for a court, on the one hand, to release all defendants on recognizance

based on their presumptive innocence or to grasp at the certainty of detention on the other, but neither alternative adequately addresses all of the legitimate interests in play. Striking the balance is made even more difficult by the essentially predictive nature of the exercise and the inevitable uncertainty of the information needed to make the decision. The court must set conditions of release based upon its "prediction" of the defendant's potential future behavior, grounded on nothing more than his past conduct. Thus, reaching a proper balance in setting the conditions of release is a judicial decision born in hope, framed by crystal-ball gazing, and informed by mind-reading.

Luckily, the legal standards for making this decision, found at 18 U.S.C. § 3142(a) and (c), take into account that fundamental uncertainty. Section 3142(a) authorizes four possible ways to handle the issue of a defendant's appearance for trial: release on recognizance or an unsecured appearance bond, release under certain conditions, temporary detention, or detention pending trial. In this case, the defendant has not sought release on recognizance or unsecured bond nor has the Government sought any form of detention. Consequently, § 3142(c) allows the court to release a defendant under conditions that will "reasonably assure the appearance of the person as required...." Such conditions of release may include the following:

- (A) ... that the person not commit a Federal, State, or local crime during the period of release; and

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person--

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode, or travel;

(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) comply with a specified curfew;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(x) undergo available medical, psychological, or psychiatric treatment, including treatment

for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;

(xii) execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community. [Italics added].

The court has stressed the operative words that the conditions need only "reasonably" assure the defendant's appearance for trial and that they be the "least restrictive" necessary to accomplish that end. These words are not merely precatory, but are critical safeguards against unnecessary deprivations of liberty.

In reaching that balance in this case, several crucial facts stand out. The defendant has been aware of the investigation of him for many months, but has done nothing to flee. He has a wife and small children, as well as community and business interests in Alabama and the United States. He is actively engaged in preparing a defense for trial. Yet, lurking ever-present, is the fact that he is a multi-millionaire, who certainly has the means and assets that could enable him to evade justice in ways that the vast majority of defendants cannot. That is not to say that he should be treated more strictly simply because he is wealthy; but it is to say that because his wealth enables him to do more things potentially to evade justice, it cannot be ignored in the assessment of his conditions of release.

Having carefully considered all of these factors, it is therefore ORDERED, that the defendant's conditions of release, previously established in the Order dated November 4, 2003, are hereby MODIFIED as follows:

1. Travel within Alabama. The defendant shall be allowed to travel freely within the State of Alabama, except for the counties of Baldwin and Mobile. Defendant shall be allowed to travel to Baldwin and Mobile counties no more frequently than once a month and for no longer than forty-eight (48) hours on each trip. He may travel to such counties only for the limited purpose of checking on his property and business interests there, and before traveling to

Baldwin and Mobile counties, defendant shall notify the probation officer of the dates and times of his proposed travel, the locations to which he will traveled, and the date on which he will return to Birmingham. He shall not enter upon or go aboard any yacht, ship, boat, or other watercraft while in Baldwin and Mobile counties. During the defendant's trips to Baldwin and Mobile counties, the defendant's wife and children shall remain in Birmingham, Alabama. The defendant and the defendant's wife shall remain accessible by telephone at all times in order to assure compliance with this provision, and defendant shall continue to make the telephonic reports required hereinbelow. Defense counsel shall personally advise defendant's wife of this provision of the Order and that any violation of it may be treated as a contempt of court.

2. Travel to New York, Washington, and Atlanta. The defendant shall be allowed to travel to New York, Washington, and Atlanta for the specific purpose of consulting with counsel. On such trips, the defendant shall travel by regularly-scheduled commercial carrier or private automobile.

In the event the defendant wishes to travel to New York, Washington, and Atlanta for the purpose of securing medical treatment for himself or an immediate family member, he may travel by private aircraft, provided, however, that he is accompanied by one of his attorneys while on or near the aircraft.

Before traveling to New York, Washington, and/or Atlanta, defendant shall notify the probation officer of the dates and times of his proposed travel, the locations to which he will travel, and the date on which he will return to Birmingham. He shall remain accessible by telephone at all times to assure compliance with this provision, and shall continue to make the telephonic reports required hereinbelow.

3. Travel to Palm Beach property. Defendant shall be allowed to travel to his Palm Beach, Florida, property no more frequently than once a month and for no longer than forty-eight (48) hours on each trip. He may travel to such property only for the limited purpose of checking on his property and business interests there, and before traveling to the Palm Beach, Florida, property, defendant shall notify the probation officer of the dates and times of his proposed travel, the locations to which he will travel, and the date on which he will return to Birmingham. On such trips, the defendant shall travel by regularly-scheduled commercial carrier or private automobile, and shall not enter upon or go aboard any yacht, ship, boat, or other watercraft. During the defendant's trips to Palm Beach, Florida, the defendant's wife and children shall remain in Birmingham, Alabama. The defendant and the defendant's wife shall remain accessible by telephone at all times in order to assure compliance with this provision. Defense counsel shall personally advise defendant's wife of this provision of the

Order and that any violation of it may be treated as a contempt of court.

Notwithstanding the provisions of the preceding paragraph, the defendant has requested permission for himself and his family to travel to the Palm Beach, Florida, property during the New Year's weekend. That request is GRANTED, subject to the following limitations. Defendant shall not leave earlier than 8:00 a.m., Tuesday, December 30, 2003, and shall return to his home in Birmingham, Alabama, by no later than 9:00 p.m., Sunday, January 4, 2004. Defendant and his family may travel, at their option, by commercial carrier or private aircraft whose pilot is employed by defense counsel, Donald Watkins. The name, address, and telephone number of the pilot shall be made known to the Government by no later than 5:00 p.m., December 29, 2003. Mr. Watkins shall personally advise the pilot that this Order restricts the defendant's use of the aircraft solely to a direct flight from Birmingham, Alabama, to Palm Beach, Florida, and back, and that any unnecessary deviation from this flight plan may be regarded as a contempt of court. While in Palm Beach, Florida, the defendant may inspect his property, including his yacht moored there, but may not have the yacht leave its regular mooring or docking with him aboard. In the event that he wishes to go aboard the yacht, defendant's wife and children shall remain at the Palm Beach property and shall not go aboard with him. Defense counsel shall



personally advise defendant's wife and the captain or other person in physical control of the yacht of this provision of the Order and that any violation of it may be treated as a contempt of court.

4. Probation Office monitoring and reporting. In light of the ineffectiveness of the electronic monitoring previously ordered by the court, that condition of release is VACATED. In lieu thereof, the defendant shall report by telephone to the United States Probation Office at least twice each day by means of a telephone that does not block or hide caller-identification by the recipient. Such calls may not be forwarded from a different location than that reported by the caller identification signal. The United States Probation Office is authorized to require any further, other, or different monitoring, including voice-identification monitoring, as it deems proper.

5. All other provisions remain unchanged. Except as modified and provided herein, all other conditions of release previously established by the court remain in full force and effect.

The Clerk is DIRECTED to forward a copy of the foregoing to all counsel of record. Not later than twenty-four (24) hours after the entry of this Order, defendant shall file an acknowledgment, personally signed by him, that he has received and understands its provisions.

DONE this the 29<sup>th</sup> day of December, 2003.

A handwritten signature in black ink, appearing to read 'T. Michael Putnam', written over a horizontal line.

T. MICHAEL PUTNAM  
CHIEF MAGISTRATE JUDGE